

Syllabus

IN THE MATTER OF
ROGERS CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2834. Complaint, June 4, 1936—Decision, July 14, 1937*

Where a corporation engaged in manufacture and sale of so-called "draw" or "deal" assortments of candy, sale and distribution of which type candy by retailers by lot or chance has capacity and tendency to, and does, decrease sale of candy sold by many manufacturers without any sales plan or device involving lottery or game of chance, i. e., the "straight" goods, and sale of which type, providing, in connection with its sale to public, means or opportunity of obtaining a box of candy as a prize or becoming a winner by lot or chance, teaches and encourages gambling, and is in violation of various municipal ordinances and regulations and State statutes and constitutions, and provides retail merchants with a means of violating the laws of the several States, and sale of which candy, so packed and assembled as to enable retail dealers, without alteration, addition, or rearrangement, to resell same to consuming public by lot or chance, is contrary to public policy—

Sold, to wholesale and retail dealers, certain assortments of candy which were so packed and assembled as to involve, or were designed to involve, use of a lottery scheme when sold and distributed to consumers thereof, and several of which were composed of a punchboard, together with a number of boxes of candy and other articles of merchandise, exceeding in value five cents each, for sale and distribution to consuming public under a plan, and in accordance with said board's explanatory legend, by which purchaser received, for five cents paid, one of said boxes of varying size, or one of said other articles of merchandise, or nothing other than privilege of making a punch, dependent upon number punched by chance, and purchaser of last punch was entitled to specified prize; so assembled and packed that such assortments might be, and were, exposed and sold to purchasing public, in accordance with aforesaid sales plan, by retail dealer purchasers thereof, and with knowledge and intent that such assortments could and would thus be used by retail dealer for distribution and resale to purchasing public by lot or chance, without alteration or rearrangement, in competition with many who do not make and sell "draw" or "deal" assortments, but sell their "straight" goods in interstate commerce in competition with the others;

With result that competitors who refused to, or do not, sell candy so packed and assembled that it can be resold to public by lot or chance, were put to a disadvantage in competing with it and with others employing methods similar to those described herein, trade was diverted to it and others using similar methods from those who do not use same, by reason of attraction to customers of so-called "draw" or "deal" assortments, there was diversion of trade to it from its said competitors, and a restraint upon and a detriment to the freedom of fair competition in trade concerned; to the prejudice and injury of the public and of competitors:

Complaint

25 F. T. C.

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Charles P. Vicini* and *Mr. Henry M. White*, trial examiners.

Mr. P. C. Kolinski and *Mr. Henry C. Lank* for the Commission.
Flood, Lenihan & Ivers, of Seattle, Wash., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Rogers Candy Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Rogers Candy Company, is a corporation organized and operating under the laws of the State of Washington, with its principal place of business located at 4547 University Way, Seattle, Wash. Respondent is now, and for several years last past has been engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers, located at points in the various States of the United States, and causes and has caused said products when so sold to be transported from its principal place of business in Seattle, Wash., to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for more than one year last past, a course of trade and commerce by said respondent in such candy between and among the States of the United States. In the course and conduct of its said business, respondent is in competition with other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

Several of the said assortments manufactured, sold and distributed by the respondent are composed of a number of boxes of candy,

together with a number of other articles of merchandise and a device commonly called a "punchboard." The said boxes of candy and other articles of merchandise are distributed to the consuming public by means of the said punchboard in the following manner: The punchboard has a fixed number of holes and in each hole is secreted a slip of paper bearing a number. The numbers begin with one and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. Sales are five cents each and when a punch is made from said board, a number is disclosed. The board bears a statement or statements informing customers and prospective customers as to which numbers receive a box of candy and the size thereof, and which numbers receive the other articles of merchandise. The board also bears a statement that the purchaser of the last punch on the board receives a specified prize. A purchaser who does not qualify by obtaining one of the numbers calling for one of the boxes of candy or one of the other articles of merchandise or by punching the last punch from the board, receives nothing for his money other than the privilege of punching a number from the board. The boxes of candy and other articles of merchandise are each worth more than five cents and a purchaser who obtains one of the numbers calling for a box of candy or one of the other articles of merchandise, receives the same for the price of five cents. The numbers on said board are effectively concealed from said purchaser or purchasers until a punch or selection has been made and the particular punch separated from the board. The boxes of candy and other articles of merchandise in said assortment are thus distributed to the purchasers from said board wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments, resell said assortments to retail dealers, and said retail dealers, and the retail dealers to whom respondent sells direct, expose said assortments for sale and sell said candy to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its product in accordance with the sales plan hereinabove set forth, and said sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a box of candy or another article of merchandise.

The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy; and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has the dangerous tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the branch of the candy trade involved in this proceeding competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

Many persons, firms, and corporations who make and sell candy in competition with the respondent, as above alleged, are unwilling to offer for sale or sell candy so packed and assembled as above alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said method and manner of packing said candy, and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent, in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by the respondent has the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or an equivalent method.

PAR. 6. Many of said competitors of respondent are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance or any other method that is contrary to public policy.

PAR. 7. The aforementioned method, acts, and practices of the respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said method, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on June 4, 1936, issued and on June 9, 1936, served its complaint in this proceeding upon the respondent, Rogers Candy Company, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by P. C. Kolinski, attorney for the Commission, and in opposition to the allegations of the complaint by Emmett G. Lenihan, attorney for the respondent, before Charles P. Vicini and Henry M. White, examiners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of Henry C. Lank, counsel for the Commission, and Emmett G. Lenihan, counsel for the respondent; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Rogers Candy Company, is a corporation organized under the laws of the State of Washington, with its principal office and place of business located at 4547 University Way, in the city of Seattle, State of Washington. Respondent is now, and for several years last past has been, engaged in the manufacture of candy in the city of Seattle and in the sale and distri-

bution thereof to retail and wholesale dealers and jobbers located in the State of Washington and in the States of Oregon, Idaho, Montana, California, and the Territory of Alaska. It causes the said candy when sold to be shipped or transported from its principal place of business in the State of Washington to purchasers thereof in Washington and in other States of the United States and the Territory of Alaska, as mentioned above. In so carrying on said business, respondent is and has been engaged in interstate commerce and is and has been engaged in active competition with other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States and in the Territory of Alaska, as mentioned above.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers, as above described, certain assortments of candy so packed and assembled as to involve, or which are designed to involve, the use of a lottery scheme when sold and distributed to the consumers thereof.

Several of said assortments are composed of a number of boxes of candy, together with a number of other articles of merchandise and a device commonly called a "punchboard." The said boxes of candy and other articles of merchandise are distributed to the consuming public by means of the said punchboard in the following manner: The punchboard has a fixed number of holes, and in each hole is secreted a slip of paper bearing a number. The numbers begin with one and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. Sales are 5¢ each, and when a punch is made from said board a number is disclosed. The board bears a statement or statements informing customers and prospective customers as to which numbers receive a box of candy and the size thereof, and which numbers receive the other articles of merchandise. The board also bears a statement that the purchaser of the last punch on the board receives a specified prize. A purchaser who does not qualify by obtaining one of the numbers calling for one of the boxes of candy or one of the other articles of merchandise, or by punching the last punch from the board, receives nothing for his money other than the privilege of punching a number from the board. The boxes of candy and other articles of merchandise are each worth more than 5¢, and a purchaser who obtains one of the numbers calling for a box of candy or one of the other articles of merchandise receives the same for the price of 5¢. The numbers on said board are effectively concealed from said purchasers or pros-

pective purchasers until a punch or selection has been made and the particular punch separated from the board. The boxes of candy and other articles of merchandise in said assortment are thus distributed to the purchasers from said board wholly by lot or chance, and the fact as to whether a purchaser receives a box of candy or one of the other articles of merchandise or nothing for his money is also determined wholly by lot or chance.

PAR. 3. The candy assortments involving the lot or chance feature, as above described, are generally referred to in the candy trade or industry as "draw" or "deal" assortments. Assortments of candy without lot or chance features in connection with their resale to the public are generally referred to in the candy trade or industry as "straight" goods. These terms will be used hereafter in these findings to distinguish these separate types of assortments.

PAR. 4. The wholesale dealers or jobbers to whom respondent sells its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell said candy to the purchasing public in accordance with the sales plan as described above.

PAR. 5. All sales made by respondent, whether to wholesale dealers and jobbers or to retail dealers, are absolute sales and respondent retains no control over said assortments after they are delivered to the wholesale dealer or jobber or retail dealer. The assortments are assembled and packed in such manner that they are designed to be used and are used by the retail dealer for distribution to the purchasing public by lot or chance without alteration or rearrangement. In the sale and distribution to jobbers and wholesale dealers for resale to retail dealers and to retail dealers direct of the assortments of candy described in paragraph 2 hereof, respondent has knowledge that said candy will be resold to the purchasing public by retail dealers by lot or chance, and it packs such candy in the way and manner described so that without alteration, addition, or rearrangement thereof it may be resold to the public by lot or chance by said retail dealers.

PAR. 6. There are in the United States many manufacturers of candy competing with respondent in the territory served by respondent who do not manufacture and sell "draw" or "deal" assortments of candy and who sell their "straight" goods in interstate commerce in competition with the "draw" or "deal" assortments. The sale or distribution of candy by retail dealers by lot or chance has the capacity and tendency to and does decrease the sale of candy sold without any sales plan or device involving a lottery or game of chance.

Several witnesses testified, and the Commission finds, that customers coming into retail establishments and desiring candy similar to that distributed by respondent would take chances or make purchases by means of said pushcards or punchboards, and that in such cases when unsuccessful in obtaining candy by means of said pushcard or punchboard some of such customers would then purchase candy as a "straight" purchase and without the use of the lottery device; that the gambling feature connected with the sale of respondent's assortments, as described above, was attractive to customers; and that before making "straight" purchases it was not unusual for customers to endeavor to procure the candy desired by means of such lottery devices rather than to make a "straight" purchase.

PAR. 7. The sale and distribution of "draw" or "deal" assortments of candy, or of candy which has connected with its sale to the public the means or opportunity of obtaining a box of candy as a prize or becoming a winner by lot or chance, teaches and encourages gambling and is in violation of various municipal ordinances and regulations and various state statutes and constitutions. The sale and distribution of candy by retailers by the method described herein is the sale and distribution of candy by lot or chance and constitutes a lottery or gaming device and the Commission finds that the sale and distribution of assortments of candy as described herein provides retail merchants with a means of violating the laws of the several states. Competitors who refuse to or who do not sell candy so packed and assembled that it can be resold to the public by lot or chance are put to a disadvantage in competing with respondent and with others employing similar methods to that described herein. Because the "draw" or "deal" assortments are attractive to customers purchasing from retail dealers, the Commission finds that trade is diverted to respondent and others using similar methods from competitors who do not use such methods. The use of such method by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and to respondent's competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 8. An officer of the respondent corporation testified, and the Commission finds, that the total annual volume of respondent's sales is approximately \$60,000, and further that approximately 25% of respondent's business consists of assortments of candy with which a punchboard is furnished.

PAR. 9. The Commission further finds that the sale and distribution in interstate commerce of assortments of candy so packed and assem-

bled as to enable retail dealers, without alteration, addition, or rearrangement, to resell the same to the consuming public by lot or chance, is contrary to public policy.

CONCLUSION

The aforesaid acts and practices of respondent, Rogers Candy Company, a corporation, under the conditions and circumstances set forth in the foregoing findings of fact, are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence taken before Charles P. Vicini and Henry M. White, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments of Henry C. Lank, counsel for the Commission, and Emmett G. Lenihan, counsel for the respondent; and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That the respondent, Rogers Candy Company, a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution in interstate commerce of candy, do forthwith cease and desist from:

1. Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are to be made, or may be made, by means of a lottery, gaming device, or gift enterprise.

2. Supplying to or placing in the hands of wholesale dealers and jobbers or retail dealers assortments of candy which are used, or which may be used, without alteration or rearrangement of the contents of such assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy contained in said assortments to the public.

Order

25 F. T. C.

3. Packing or assembling in the same assortment of candy for sale to the public at retail boxes of candy, together with a device commonly called a "punchboard," which punchboard is for use, or which may be or is designed to be used, in distributing or selling said candy to the public at retail.

4. Furnishing to retail and wholesale dealers and jobbers a device commonly called a "punchboard," either with assortments of candy or separately, bearing a legend or legends or statements informing the purchasing public that the candy is being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

It is further ordered, That respondent, Rogers Candy Company, a corporation, shall, within 30 days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF
KRAFT-PHENIX CHEESE CORPORATION

COMPLAINT, OPINION, AND ORDER OF DISMISSAL IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1938

Docket 2935. Complaint, Sept. 30, 1936—Order, July 17, 1937

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, SUBSEC. (A)—“COMMERCE”—RETAILER PURCHASER OF PRODUCER SELLER'S JOBBERS UNDER PRODUCER SELLER'S INTEGRATED NATION-WIDE PRICING SYSTEM AND PLAN, WHERE DIRECT PRODUCER SELLER TO RETAILER CONTACT, SOLICITATION AND SERVICE AND UNINTERRUPTED FLOW FROM WAREHOUSE TO JOBBER TO RETAILER, AS “PURCHASER.”

Complaint charged with unlawful discrimination in violation of aforesaid section, respondent, engaged on a nation-wide scale in distributing and selling its extensively advertised processed cheese, packaged cheese and salad dressing from its various warehouses to jobbers and wholesalers for resale to retailers, contacted by its salesmen, serviced by it, and supplied by continuous flow and current of commerce in its products from factories to warehouses and from warehouse to retailer over regularly established routes to known retailers, business of which, as aforesaid, it personally solicited, and as to which it made effective price policies and schedules of its own:

Held, Respondent, in setting up and putting into effect, as aforesaid, its said price system to retailers, engaged in interstate commerce, and sales of its products to retailers likewise in course of such commerce, and retailer, purchasing its said goods from jobbers and wholesalers, equally “purchaser” under act with retailer buying direct.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, SUBSEC. (A)—QUANTITY AND VOLUME DISCOUNTS AND DIFFERENTIALS—COSTS—WHERE PRACTICAL IMPOSSIBILITY OF ACCURATE ALLOCATIONS TO EACH KIND AND AMOUNT OF PRODUCT FROM SAME DELIVERING INSTRUMENTALITY, BUT REASONABLE PRESUMPTION OF SUPPORTING DIFFERENCE.

Where any reasonable allocation of delivery cost would unquestionably leave a difference large enough to support a given difference in price on the basis of certain varying quantity purchases and delivery methods, and there is a reasonable presumption that such difference would justify entire price differential, practical impossibility of making accurate allocation of costs to each kind and amount of product delivered from same truck is no ground for ignoring such reasonable inference.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, SUBSEC. (A)—QUANTITY AND VOLUME DISCOUNTS AND DIFFERENTIALS—WHERE REASONABLE IN PURPOSE AND AVAILABILITY AND ADVERSE COMPETITIVE EFFECT ON PRODUCER SELLER'S COMPETITORS NEITHER INTENDED NOR EVIDENT, NOR INJURY PERCEPTIBLE AS BETWEEN FAVORED AND NON-FAVORED RETAILER PURCHASERS

Where, on complaint charging respondent, engaged as aforesaid, with unlawful discrimination in violation of section in question in allowing from one-half cent to two and one-half cents discount, as case might be,